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November 12, 2019

The Honorable Janet Dhillon
Chair
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

RE: Notice of Information Collection—Request for new Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2

Dear Chair Dhillon:

We respectfully submit these comments in response to the U.S. Equal Employment Opportunity Commission's (EEOC) "Notice of Information Collection—Request for new Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2" (September 12 Notice).¹ We write specifically in support of EEOC's intention to discontinue collecting pay data from employers. The lack of utility of the data, the burden of the collection, and the risk to the privacy and confidentiality of the data are all very compelling reasons to stop this part of the information collection.

Under Title VII of the *Civil Rights Act of 1964*, EEOC may collect reports from employers "by regulation or order ... as reasonable, necessary, or appropriate for the enforcement" of Title VII.² Since 1966, EEOC utilizing the EEO-1 form has collected data from employers regarding employees' race, sex, and ethnicity by job category. This year, for the first time in the history of

¹ Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138 (Sept. 12, 2019) [hereinafter September 2019 Notice].

² 42 U.S.C. § 2000e-8(c).

the EEO-1, EEOC is collecting, in compliance with a court order,³ employee pay data broken down by race, sex, ethnicity, and job category.

EEOC must periodically seek approval of the EEO-1 form from the Office of Management and Budget (OMB) pursuant to the *Paperwork Reduction Act* (PRA). The purpose of the PRA is to “ensure the greatest possible public benefit and maximize the utility of the information ... collected”; “improve the quality and use of Federal information”; “minimize the paperwork burden ... resulting from the collection of information by or for the Federal Government”; and “ensure” the collection “is consistent with applicable laws ... relating to ... privacy and confidentiality.”⁴ To carry out these purposes, the OMB Director must “review and approve proposed agency collections of information” to “maximize the practical utility of and public benefit from the information collected,” “minimize the Federal information collection burden,” and “ensure” the “confidentiality of information collected.”⁵ The EEO-1 pay data collection fails on all of these counts.

Lack of Utility

EEOC’s notice of July 14, 2016, stated that EEOC intended to use the collected pay data to support “data analysis at the early stages of an investigation, using statistical tests to identify significant disparities in reported pay.” EEOC further stated it intended to publish reports using aggregated pay data that may be “useful tools for employers to engage in voluntary self-assessment of pay practices.” EEOC is collecting data in 12 pay bands broken down by race, sex, ethnicity, and 10 job categories.⁶

However, the EEO-1 pay data collection will be of no use in combatting pay discrimination. EEOC has admitted the pay-band data cannot be used to enforce discrimination laws because it is too imprecise to show discrimination accurately. EEOC acknowledged that pay-band data “is not a valid way of collecting pay data for purposes of enforcing discrimination laws.”⁷ Craig Leen, Director of the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), at a recent hearing before the Committee on Education and Labor Subcommittee on Civil Rights and Human Services, agreed with this assessment and testified that the EEO-1 pay data is “too general” to make a statistically significant finding of potential discrimination.⁸ EEO-1 pay data will thus not assist EEOC in investigating pay discrimination.

³ See *National Women’s Law Ctr. v. OMB*, No. 17-2458 (D.D.C. Apr. 25, 2019) (order).

⁴ 44 U.S.C. § 3501(1)-(2), (4), (8)(A).

⁵ *Id.* § 3504(c), (e)(1)(B).

⁶ Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479, 45,489, 45,491 (July 14, 2016) [hereinafter July 2016 Notice].

⁷ Brief of the Chamber of Com. of the U.S. et al. as Amici Curiae in Support of Appellants Supporting Reversal at 20, *National Women’s Law Ctr. v. OMB*, 19-5130 (D.C. Cir. Aug. 26, 2019) [hereinafter Chamber Brief] (quoting J.A. at 75) (quotation marks omitted).

⁸ *Examining the Policies and Priorities of the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP): Hearing Before the Subcomm on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (testimony of Craig Leen, Dir., OFCCP).

For similar reasons relating to the lack of data validity, published reports of aggregated pay data taken from the EEO-1 collection will not help employers to engage in voluntary self-assessment of their pay practices. EEOC's Chief Data Officer raised concerns in April 2019 about the soundness of comparing groups of employees based on the EEO-1 pay data collection.⁹ Moreover, it is not unlawful for one employer to pay a group of employees less than another employer's employees, raising questions about the usefulness of publishing reports on aggregated pay data.¹⁰

More broadly, as EEOC's Chief Data Officer points out in his declaration, EEOC failed to do a true pilot study of the pay data collection as recommended by the 2012 National Academy of Sciences (NAS) report titled "Collecting Compensation Data from Employers." Without a true pilot study, the pay data collection has "major data validity and reliability issues."¹¹ In fact, as EEOC Chair Janet Dhillon recently noted in her testimony before the Subcommittee on Civil Rights and Human Services, EEOC has only adopted one of the six recommendations made by the 2012 NAS report.¹² For additional reasons why the EEO-1 pay data collection lacks utility in combatting pay discrimination, we are attaching the comment letter submitted to OMB by the then-Chairman of the Education and the Workforce Committee and then-Chairman of the Subcommittee on Workforce Protections on August 15, 2016.¹³

Excessively Burdensome

The EEO-1 pay data collection is overly burdensome, especially considering the collection's lack of utility in combatting pay discrimination. Employers with 100 or more employees must report pay data in 12 pay bands for 10 job categories broken down by the employees' race, sex, and ethnicity. Employers must file a report for each physical location of their business.¹⁴ Adding pay data to the EEO-1 expanded the number of fields for each report from 180 fields to 3,660 fields, enlarging the report by more than 20 times.¹⁵

EEOC's final annual burden estimate for employers in 2016 for compiling and submitting the EEO-1 with pay data was \$53.5 million,¹⁶ an estimate that the private sector vigorously disputed as far too low.¹⁷ Skeptics of EEOC's 2016 estimate have been vindicated by EEOC's new burden

⁹ Samuel C. Haffer Decl. ¶¶ 28, 30-32, National Women's Law Ctr. v. OMB, 17-02458 (D.D.C. Apr. 3, 2019).

¹⁰ See Chamber Brief, *supra* note 7, at 20-21.

¹¹ Haffer Decl., *supra* note 9, ¶ 32.

¹² See *Examining the Policies and Priorities of the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP): Hearing Before the Subcomm on Civ. Rights & Hum. Serv. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019) (testimony of Janet Dhillon, Chair, EEOC).

¹³ Letter from John Kline, Chairman, Cmte. on Educ. & the Workforce, and Tim Walberg, Chairman, Subcomm. on Workforce Protections, to Joseph N. Dye, Pol'y Analyst, Off. of Info. & Reg. Affairs, OMB (Aug. 15, 2016) (attached). We also attach this letter for the additional comments it makes regarding the burden on employers and risks to the privacy and confidentiality of the pay data.

¹⁴ September 2019 Notice, *supra* note 1, at 48,140 n. 4.

¹⁵ Comments of the Equal Emp. Advisory Council on the EEOC's Proposed Revisions of the Employer Information (EEO-1) Report at 19 (Apr. 1, 2016), <http://www.eeac.org/public/Proposed%20EEO-1%20Revisions.pdf>.

¹⁶ September 2019 Notice, *supra* note 1, at 48,140.

¹⁷ See Declaration & Report of Ronald Bird Regarding Results of a Survey of Affected Companies Regarding EEO-1 Information Collection Burdens at 7 (Mar. 30, 2016), https://www.uschamber.com/sites/default/files/documents/files/uscc_eeo1_comments_april_1.pdf.

estimate in the September 12 Notice. EEOC now estimates the burden of the EEO-1 with pay data to be \$622 million in 2018,¹⁸ over 11 times more than the 2016 estimate, which is in line with private-sector estimates. EEOC used the 2016 estimate to seek approval from OMB of adding pay data to the EEO-1 pursuant to the PRA. The tremendous difference between the 2016 estimate and EEOC's new estimate is reason enough for EEOC to discontinue this unduly burdensome new data collection that will not help EEOC or employers to combat pay discrimination.

Credible Risks to Privacy and Confidentiality of Data

Data breaches are a constant threat for government agencies, as demonstrated in 2015 with a major breach of databases at the U.S. Office of Personnel Management.¹⁹ The 2012 NAS report noted that “the sensitivity of the data that employers provide to EEOC will be heightened if earnings data are added to EEO data records, since employee compensation data are generally considered to be highly sensitive, even proprietary information, by most employers.” The report recommended that EEOC should consider “implementing appropriate data protection techniques ... to protect the confidentiality of the [pay] data.”²⁰

The NAS report specifically raised concerns about data-sharing agreements EEOC has with other federal agencies, state and local fair employment practice agencies, and contractors. EEOC also regularly shares EEO-1 data at the level of individual employer locations with academic researchers, who have been eagerly anticipating access to pay data at this level.²¹ The report characterized these agreements as “rather informal arrangements” and also pointed out EEO-1 data is not “shielded from court challenges or [FOIA] requests” directed to other agencies.²² OFCCP also has access to the EEO-1 reports of federal contractors and subcontractors, and OFCCP is subject to FOIA requests for these reports.

Despite the different avenues through which pay data confidentiality could be undermined, there is no indication in the notices EEOC published in 2016 regarding adding pay data to the EEO-1 that the agency has taken the steps recommended by NAS to protect data confidentiality. Indeed, EEOC's Chief Data Officer raised concerns in April 2019 about “securely collect[ing] and stor[ing] this significantly increased volume of highly sensitive data.”²³

The EEO-1 pay data collection also presents a threat to the privacy of individual employees. EEOC has stated it intends to use the pay data to “publish reports on pay disparities by race, sex, industry, occupational groups, and Metropolitan Statistical Area.”²⁴ Currently, EEO-1 data

¹⁸ September 2019 Notice, *supra* note 1, at 48,141.

¹⁹ See Ellen Nakashima, *Hacks of OPM databases compromised 22.1 million people, federal authorities say*, WASH. POST, July 9, 2015.

²⁰ NATIONAL ACAD. OF SCI., COLLECTING COMPENSATION DATA FROM EMPLOYERS 5 (2012).

²¹ See, e.g., *Public Input into the Proposed Revisions to the EEO-1 Report: Hearing Before EEOC* (Mar. 16, 2016) (written testimony of Elizabeth Hirsch, Associate Professor, Sociology & Can. Res. Chair in Inequality & Law, U. of B.C.) (“With compensation data, the academic research community could extend [EEO-1] research to understanding pay disparities and their remediation.”).

²² NATIONAL ACAD. OF SCI., *supra* note 20, at 84.

²³ Haffer Decl., *supra* note 9, ¶ 21.

²⁴ July 2016 Notice, *supra* note 6, at 45,491.


published on EEOC's website can reveal employees' personally identifiable information if a search is done by industry and geography.²⁵ The expanded EEO-1 with 12 pay bands will only exacerbate this problem by revealing more identifiable information. This is highly sensitive information for employees who may not want it disclosed. NAS stated that "it will be important for EEOC to develop more sophisticated techniques for protecting data that are provided in tabular and microdata form to the public,"²⁶ but EEOC's notices do not indicate it has taken needed steps to protect employees' privacy.

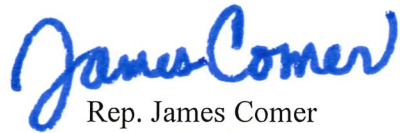
Conclusion

The PRA includes commonsense standards to ensure data-collection mandates on the public will be useful for appropriate government functions, will not overly burden the public, and will not unduly risk exposure of private and confidential information. The EEO-1 pay data collection fails to meet any of the PRA's standards, and we urge EEOC to discontinue this collection as the September 12 Notice proposes.

Thank you for your consideration of these comments.

Respectfully submitted,


Rep. Virginia Foxx
Ranking Member


Rep. James Comer
Ranking Member
Subcommittee on Civil Rights and Human
Services

²⁵ Letter from Michael J. Eastman, Vice President, Equal Emp't Advisory Council, to Bernadette Wilson, Acting Exec. Officer, EEOC, at 13-14 (Apr. 1, 2016), <http://www.eeac.org/public/Proposed%20EEO-1%20Revisions.pdf>.

²⁶ NATIONAL ACAD. OF SCI., *supra* note 20, at 5.